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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 79-361

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

HENRY L. TAGLIERI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

FRANCIS X. BELLOTTI,
Attorney General

BARBARA A. H. SMITH,
Chief, Criminal Appellate Division

BERNARD MANNING,
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
Tel. (617) 727-2240

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Opinion Below.

The opinion of the court below (App. A.) is reported at 1979 Mass. Adv. Sh. 1405, 390 N. E. 2d 727.

Jurisdiction.

The decision of the court below was entered on June 4, 1979. The jurisdiction

of this court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Whether the magistrate's issuance of a search warrant is definitive on the question of probable cause?

2. Whether a magistrate's determination that facts alleged in an affidavit are sufficient to constitute probable cause for the issuance of a search warrant, absent arbitrariness, is conclusive and not subject to further judicial review?

Constitutional Provisions Involved.

Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable

cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of the Case.

Prior Proceedings.

On August 1, 1974, Henry L. Taglieri was arrested at his home, 123 Larkin Street, Revere, Massachusetts. The following day he was charged in two criminal complaints with violations of the gambling law by using a telephone for wagering and being found with apparatus for registering bets.

In September, 1974, defendant moved to suppress all evidence seized under the search warrant. After hearing, argument, and the submissions of briefs by the parties, the District Court Judge denied the motion. Defendant was put to trial on the complaints and found guilty.

Defendant appealed to the Superior Court for a jury trial de novo. He then again moved to suppress all evidence seized under the search warrant. After hearing, argument, and the submission of briefs by the parties, the Superior Court judge again denied the motion. On May 18, 1976, after a jury waived trial before the hearing judge, defendant was again found guilty on both criminal complaints. He was sentenced to a term of imprisonment but incarceration was stayed pending appeal.

On October 19, 1978, the Massachusetts Appeals Court found that the affidavit executed in support of the application for the issuance of the warrant did not "provide the magistrate with a substantial basis for concluding that any of such articles was probably present on the premises sought to be searched." (App. B) reported at 1978 Mass. App. Ct. Adv. Sh. 1022, 381 N. E. 2d 1118.

The Commonwealth sought and was granted further appellate review. The Massachusetts Supreme Judicial Court after

argument reversed the judgments of the Superior Court. On June 27, 1979 the Supreme Judicial Court denied the Commonwealth's request for a rehearing.

Statement of Facts.

The facts as reported by the Supreme Judicial Court, are as follows:

A State Police officer, who had experience in gathering information concerning gambling and organized crime, by affidavit (App. C) presented certain facts on personal knowledge. In May, 1974, pursuant to court order, an electronic interceptor of telephone calls had been authorized concerning two telephones at an address in East Boston. In late May and in the first part of June, 1974, State Police officers intercepted and recorded various telephone conversations made to and from the telephones at the East Boston address. The substance of these conversations showed that several individuals were using these telephones to conduct an illegal gambling

operation. The police officer was able to identify who these individuals were. Each had been convicted of gambling violations. (App. A, p. 25)

Two telephone calls were made from the East Boston address to a telephone listed to the defendant and installed at the Revere premises for which the search warrant was sought. On May 29, 1974, at approximately 3:25 P.M. one of the identified individuals called the Revere telephone number and spoke to a man he called "Butch". During this telephone call, "Butch" placed two bets with the caller from East Boston. More than two weeks later, at approximately 1:51 P.M. on June 13, 1974, the same individual called the Revere number from the East Boston address, spoke to a man named "Henry" and told "Henry" the results of the first race at Suffolk Downs race track. [in East Boston] Based on this information and his personal knowledge, the police officer represented that there was probable cause to believe that certain gaming materials

and devices could be found in the Revere house. A judge of the Superior Court issued a warrant to search the Revere premises. (App. A, p. 26)

On August 1, 1974, the police entered and searched the Revere premises. They seized various items, including papers with notations indicating number pool play and horse bets. (App. A, p. 26)

Reasons for Granting the Writ.

The petition presents an issue of law that demands resolution by this Court to alleviate confusion, create a uniform practice among the circuits, and establish a standard to guide state courts reviewing a Fourth Amendment mandate.[1/]

[1/] The standards for reviewing a magistrate's determination of probable cause for the issuance of a search warrant, differ among the circuits and are not uniformly applied within the same circuit.

Argument.

I. WHERE AN AFFIDAVIT STATES FACTS DEMONSTRABLY RELIABLE AND THIS INFORMATION IS RELEVANT AND MATERIAL, THE ISSUING MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE IS CONCLUSIVE AND NOT SUBJECT TO FURTHER REVIEW.

Here, an experienced judge of the Superior Court after reviewing an

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Footnote No. 1 continued.

First Circuit.

In Gracie v. United States, 15 F. 2d 644, 646 (CA1 1966) cert. denied, 373 U. S. 748, the First Circuit initially promulgated the rule that the magistrate's determination of probable cause is conclusive unless arbitrarily exercised. No other First Circuit cases were found

affidavit, executed by a specially trained police officer found probable cause and issued a search warrant. The magistrate's initial determination was subsequently affirmed by trial justices of the District and Superior Court levels. More than four years after the fact, three appellate judges sat in review of the magistrate's judgment. They found the affidavit did not "provide the magistrate with a substantial basis for concluding that any of such materials was probably present". (App. B)

Footnote No. 1 continued.

that considered the identical issue. Notwithstanding its lack of continuous recognition in the First Circuit, Gracie has been extensively cited and regarded as precedent in a number of other circuits.

Second Circuit.

Ramirez v. United States, 279 F. 2d 712, 716 (CA2 1960), regards the magistrate's finding as a "substantial

The Supreme Judicial Court in rendering its decision upon a federal constitutional question imposed an unduly restrictive standard of review upon the magistrate's authority described in the Fourth Amendment.

Where, as here, the reliability of the information is not in issue and some relevant and material facts are stated in the affidavit, a finding of probable cause

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Footnote No. 1 continued.

factor tending to uphold the validity of the warrant." Although the "substantial factor concept" is cited in a subsequent Second Circuit case, United States v. Follette, 379 F. 2d 846, 848 (CA 2 1967) a year later its effect was lessened by reducing the forcefulness of the phrase and to be considered as an "important factor", United States v. Lewis, 392 F. 2d 377, 380 (CA2 1968) cert. denied, 393 U. S. 891 more current cases in that circuit appear to adopt idea that "deference" will be given to the magistrate's determination.

by the magistrate should be deemed conclusive and not subject to further judicial review. Both public necessity and the interests of justice demand that a factual determination by an experienced judge made in the exercise of his wisdom be given great deference. Although differences of opinion may continue to exist among reasonable men, the Constitution is not well served by subjecting a finding a probable cause to successive levels of judicial scrutiny until overturned. The mandate of the Fourth Amendment is met once the imprimatur

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Footnote No. 1 continued.

Mapp v. Warden, 531 F. 2d 1167, 1172 (CA2 1976) cert. denied, 494 U. S. 983; United States v. Gomez Londano, 553 F. 2d 805, 810 (CA2 1977).

Third Circuit.

The courts of this circuit invoke the "great deference" standard as promulgated by Spinelli v. United States, 393 U. S.

of an impartial and reasonable magistrate is interposed between the investigating officer and his quarry.

II. TO ENCOURAGE CONSISTENCY IN THE JUDICIAL PROCESS, A STANDARD FOR REVIEWING THE ISSUING MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE IS NECESSARY.

The magistrate's determination of probable cause is restricted to facts stated in the affidavit and reasonable inferences that he may draw from that information. According to present procedure, the court, when in sitting in

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Footnote No. 1 continued.

410, 419 (1969). See "Great Deference" United States v. McNally, 338 F. Supp. 341, 346 (E. D. Pa. 1972), reversed on

review of the magistrate's judgment, has the same facts to scrutinize but the inferences the reviewer makes may differ based upon his education, training, background, and experience. This does not imply that inferences should not be made, rather it suggests that inferences should not be made subject to unlimited review.

The idea of according a magistrate's determination conclusive should not be considered anomalous when compared to similar practices designed to minimize judicial speculation. In a criminal appeal,

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Footnote No. 1 continued.

other grounds, 473 F. 2d 934 (CA3 1973) affirmed (without opinion) 491 F. 2d 751 (CA3 1973), cert. denied, 417 U. S. 948, (1974) and United States v. Taylor, 334 F. Supp. 1050, 1053 (E. D. Pa. 1971). affirmed 469 F. 2d 284 (CA3 1972).

Fourth Circuit.

Here, the courts accord a "substantial basis" and "great weight" to the

the court views the evidence in a light most favorable to the government. A statute is endowed with a presumption of constitutionality - if a statement of facts could exist which would justify the legislation, it is presumed to have existed when the statute was passed.

Footnote No. 1 continued.

magistrate's judgment. United States v. Fuller, 441 F. 2d 755, 759 (CA4 1971), cert. denied, 404 U. S. 830, (1971); United States v. Melvin, 419 F. 2d 136, 142 (CA4 1969).

Fifth and Sixth Circuits.

The courts of the Fifth Circuit specifically adhere to the rule of conclusiveness in the absence of arbitrariness, Bastida v. Henderson, 487 F. 2d 860, 863 (CA5 1973) and the Sixth Circuit has consistently held the magistrate's determination conclusive "since the purpose of the Fourth Amendment has been served by his review of the

A court of review should not adopt a more severe standard when evaluating a probable cause finding than it employs in matters more crucial to the rights of the criminal defendant. To tolerate such an untoward result is to repudiate the teaching of United States v. Ventresca, 380 U. S. 102, 109 (1965), defy the logic of the Fourth Amendment, encourage the continued diversion of limited judicial resources, and discourage resort to the very process designed to insure a person's security from unwarranted intrusion by law enforcement authorities.

Footnote No. 1 continued.

affidavit." United States v. Giacalone, 541 F. 2d 508, 513 (CA6, 1976). See also United States v. Swihart, 554 F. 2d 264, 270 (CA6, 1977); United States v. Sevier, 539 F. 2d 599, 603 (CA6, 1976); Payne v. United States, 508 F. 2d 1391, 1393 (CA5 1975); United States v. Jordan, 349 F. 2d 107, 108 (CA6 1965); United States v. Gosser, 339 F. 2d 102, 111 (CA6 1964).

An appropriate standard was initially promulgated by the First Circuit in 1926 and since followed in a number of jurisdictions. In Gracie v. United States, 15 F. 2d 644, 646 (CA 1 1926) cert. denied, 273 U. S. 748. The Court reasoned:

> "Upon the determination by the Commissioner of whether probable cause existed for the issuance of a warrant, he is to exercise his own judgment whether the facts alleged in the affidavit constitute probable cause, and unless this judgment is arbitrarily exercised his determination that probable cause exists is conclusive."

Footnote No. 1 continued.

Seventh Circuit.

A search of authorities did not disclose any cases in this circuit giving specific consideration to the matter in issue.

Eighth Circuit.

This circuit gives "considerable

deference" to the magistrate's determination conclusive "since the purpose of the Fourth Amendment has been served by his review of the affidavit." United States v. Giacalone, 541 F. 2d 508, 513 (CA6 1976)

A magistrate is not required to approach the officer's affidavit with an attitude of disbelief and strive to construe its meaning in every way possible to defeat its purpose. He may, within reason, accord substance to the fact that

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Footnote No. 1 continued.

deference" to the magistrate's determination. See: "Considerable Deference" - United States v. Olsen, 487 F. 2d 77, 82 (CA8 1973), cert. denied, 415 U. S. 993 (1974) rehearing denied 416 U. S. 975 (1974).

an experienced officer believes that the items sought would be found at the location designated. While the naked averment made by a seasoned officer that criminal activity was afoot, by itself, would not support a finding of probable cause, the experienced officer's sworn statement must be accorded some weight.

Since on the facts, the existence of an illegal gambling enterprise must be conceded, the magistrate had reasonable

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Footnote No. 1 continued.

Ninth Circuit.

Here "deference" is accorded the magistrate's judgment but its degree varies, "great". United States v. Fried, 576 F. 2d 787, 791 (CA9 1978) cert. denied, U. S. , 99 S. Ct. 255 (1978) and "substantial" United States v. Bowers, 534 F. 2d 186, 188-189 (CA9 1976) cert. denied, 429 U. S. 942 (1976).

Tenth Circuit.

Here again the courts within the circuit are not in harmony when determining

basis for concluding Taglieri was implicated. East Boston was monitored eight days out of a twenty day period. Revere was called on two of these days. The telephone call of May 29, 1974, was initiated by "Chick" who operated an extensive illegal bookmaking operation. The bookmakers do not ordinarily telephone the

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Footnote No. 1 continued.

the value given the magistrate's judgment. "Deference" - United States v. Brinklow, 560 F. 2d 1003, 1006 (CA10 1977), cert. denied, 434 U. S. 1047 (1978) and United States v. Rahn, 511 F. 2d 290, 292 (CA10 1975), cert. denied, 423 U. S. 825 (1975). "Substantial consideration" - United States v. Neal, 500 F. 2d 305, 308 (CA10 1974).

D. C. Circuit.

This circuit accords "a presumption of regularity" that attends the action of the magistrate issuing the search warrant. Irby v. United States, 314 F. 2d 251 (DC Cir. 1973), cert. denied, 374 U. S. 842 (1963).

gambling public to solicit wagers, Commonwealth v. Alessio, 1979 Mass. Adv. Sh. 95 96-99 even when the customer is in the habit of betting substantial sums of money. Sagansky v. United States, 358 F. 2d 195, 198-201 (CA1 1966) cert. denied, 385 U. S. 816.

A "lay off bet" is not so esoteric a phrase that a magistrate of experience and affairs must claim ignorance of its import in illegal gambling operations. United States v. Santarpio, 360 F. 2d 448, 454 (CA1 1977), cert. denied, 434 U. S. 984; United States v. Flotkin, 550 F. 2d 693, 695 n. 1 (CA1 1977), cert. denied, sub. nom., Considine v. United States, 434 U. S. 820.

When consideration is given to the telephone call of June 13, 1974, again initiated by "Chick" to Henry, the magistrate could reasonably infer that this disclosure of racing intelligence may be of some importance to an illegal gambling operation. In addition, the disclosure informed Henry that the first race had been

run thwarting "post posting" and permitting Henry to balance his books. It would not be reasonable for the magistrate to infer that a bookmaker calls a bettor simply to inform him of race results, common experience demonstrates the converse to be true.

Finally, it is obvious that the Revere telephone would not only be used in evidence against the occupant of that household but could also provide strong corroboration of the East Boston operators and would be admissible against "Chick" et al. under the mere evidence rule of Warden v. Hayden, 387 U. S. 294 (1967).

As the Court in United States v. Berry, 463 F. 2d 1278, 1285 (D. C. Cir. 1972) observed

> "But we must take into account that a magistrate, experienced in these matters is entitled to draw inferences from acts which to the uninitiated and unskilled would be seemingly innocent acts."

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,
FRANCIS X. BELLOTTI
Attorney General

BARBARA A. H. SMITH,
Assistant Attorney General
Chief, Criminal Appellate Division

BERNARD MANNING,
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
Telephone (617) 727-2240

APPENDIX A

COMMONWEALTH vs. HENRY L. TAGLIERI.

Suffolk. March 6, 1979. - June 4, 1979. Present: Hennessey, C.J., Quirico, Kaplan, Wilkins, & Abrams, JJ.

Search and Seizure. Probable Cause. Complaints received and sworn to in the District Court of Chelsea on August 2, 1974.

On appeal to the Superior Court a motion to suppress evidence was heard by DeGuglielmo, J., a judge of the Municipal Court of the City of Boston sitting under statutory authority, and the cases were heard by him.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Bernard Manning, Assistant Attorney General, for the Commonwealth.

Margaret Hayman, for the defendant.

WILKINS, J. We granted further appellate review in this case to consider whether there was sufficient information contained in an affidavit in support of a search warrant to constitute probable cause. The Appeals Court held that there was not. Commonwealth v. Taglieri, Mass. App. Ct. (1978).[a] We agree.

We summarize the affidavit. A State Police officer, who had experience in gathering information concerning gambling and organized crime, by affidavit presented certain facts on personal knowledge. In May, 1974, pursuant to court order, an electronic interceptor of telephone calls had been authorized concerning two telephones at an address in East Boston. In late May and in the first part of June, 1974, State police officers intercepted and

[a] Mass. App. Ct. Adv. Sh. (1978) 1022.

recorded various telephone conversations made to and from the telephones at the East Boston address. The substance of these conversations showed that several individuals were using these telephones to conduct an illegal gambling operation. The police officer was able to identify who these individuals were. Each had been convicted of gambling violations.

Two telephone calls were made from the East Boston address to a telephone listed to the defendant and installed at the Revere premises for which the search warrant was sought. On May 29, 1974, at approximately 3:25 P.M. one of the identified individuals called the Revere telephone number and spoke to a man he called "Butch." During this telephone call, "Butch" placed two bets with the caller from East Boston. More than two weeks later, at approximately 1:51 P.M. on June 13, 1974, the same individual called the Revere number from the East Boston address, spoke to a man named "Henry" and told "Henry" the results of the first race

at Suffolk Downs race track. Based on this information and his personal knowledge, the police officer represented that there was probable cause to believe that certain gaming materials and devices could be found in the Revere house. A judge of the Superior Court issued a warrant to search the Revere premises.

On August 1, 1974, the police entered and search the Revere premises. They seized various items, including papers with notations indicating number pool play and horse bets. The defendant was charged with the use of a telephone for the purpose of accepting or placing wagers and with being present in a place with betting apparatus. The defendant was convicted in a District Court and appealed to the Superior Court. He filed a motion to suppress the evidence, which was denied. He was then convicted in a jury-waived trial in the Superior Court and given concurrent sentences to a house of correction. A Justice of the Appeals Court granted a stay of execution pending appeal.

The Commonwealth argues that the judge issuing the search warrant could use his experience to determine the significance of the facts set forth in the affidavit. We have recently acknowledged that a judge or magistrate may apply common knowledge and may draw reasonable inferences from the facts before him. See Commonwealth v. Alessio, Mass. , (1979).[b/] See also G.L. c. 271, §27. This is consistent with the view that "affidavits for search warrants...must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." United States v. Ventresca, 380 U. S. 102, 108 (1965). We would not, however, accept an argument that the peculiar experience and knowledge of an issuing jusge or magistrate would support the issuance of a warrant. The result should not turn on who the magistrate is or how much special knowledge he may have. We would accept only inferences which an experienced magistrate could draw as a

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b/ Mass. Adv. Sh. (1979) 95, 102.

commonsense conclusion from the information set forth in the affidavit. See 1 W.R. LaFave, Search and Seizure 463 (1978). Although some courts have sometimes spoken broadly of the deference to be accorded the expertise of an issuing magistrate, a close examination of the cases reveals no willingness to defer to inferences which do not follow as a matter of common sense from the affidavit. See, e.g., United States v. Berry, 463 F. 2d 1278, 1285 (D.C. Cir. 1972). Although weight should be given to the judgment and experience of a judge or magistrate who issued a warrant, with the result that its issuance will be upheld if there was a reasonable basis for finding probable cause (Rosencranz v. United States, 356 F. 2d 310, 314 [1st Cir. 1966]), the affidavit "must set forth the basis for the magistrate's inference with enough precision" for the determination to be scrutinized at a subsequent hearing on a motion to suppress or on appeal from a decision on a motion to suppress. (id. at 317).

We agree with the Commonwealth that weight must be given to the special experience of a law enforcement who has executed an affidavit. For example, where such an officer states that he has drawn inferences from facts which an inexperienced person might not draw from those facts, the magistrate may rely on those inferences. Consequently, if a seemingly minor fact has particular significance to an expert, not apparent from common knowledge and experience, because of the method by which criminal operations are conducted, the affidavit should disclose its significance. See 1 W.R. LaFave, Search and Seizure 463 (1978).

Although there were facts constituting probable cause to believe that gaming operations were carried on at the East Boston address, the facts in the affidavit concerning the Revere address showed only that (1) on one occasion a person at the Revere address received a telephone call and placed two bets, and (2), fifteen days later, a person at the Revere address

received the results of a horse race. These two facts do not constitute probable cause to believe that gaming operations were conducted at the Revere address, even when coupled with the fact that the telephne calls were made by a convicted gambler from premises where it reasonably appeared gaming operations were conducted.

The Commonwealth argues, however, that an inference could be drawn from the facts about the gambling operation which would support the conclusion that the defendant accepted wagers fron street bookies at the Revere address and dealt with other bookies at a "central" officer at the East Boston premises. The Commonwealth suggests that the call from East Boston during which a bet was placed by a person at the Revere address was to collect layoff bets from a bookie at the Revere address.[1/] As to

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[1/] In one form of more socially acceptable risk taking, this process of lay-off bets would be called reinsurance.

the second telephone call, the Commonwealth suggests that the information concerning the results of the first race at Suffolk Downs advised a confederate at the Revere address to take no further bets and permitted the confederate to balance his books crediting and debiting his customers' accounts. The Commonwealth argues generally that the issuing judge could have concluded from common knowledge and experience that bookies do not call customers to receive bets and to disclose race results. Hence, the calls from East Boston to Revere must have been from one part of the gambling operation to another.[2/]

[2/] No argument based on inferences concerning the nature of the gambling operations was made at the hearing on the motion to suppress or in the Commonwealth's brief on appeal. The claim first was advanced in the Commonwealth's application for further appellate review. If these

We reject any suggestion that a judge or magistrate could reasonably draw these conclusions from the limited facts presented in the affidavit. The experienced officer who signed the affidavit did not state that he drew any inferences of the sort the Commonwealth now advances in support of the search. The affidavit did not disclose the length or contents of the telephone calls, beyond what has been described above. For example, it did not disclose the size of the bets placed in the first telephone call, which might have a significant bearing on the Commonwealth's claim that the transaction involved lay-off bets. The

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Footnote No. 2 continued.
inferences were so apparent to experienced observers, it is surprising that the Commonwealth did not argue them at the earliest stages of this case.

inferences which the Commonwealth argues support the issuance of the warrant are not ones which could have been drawn reasonably as a matter of common knowledge by the issuing judge.[3/]

We agree with the determination of the Appeals Court that the two telephone conversations referred to in the affidavit in support of the search warrant were the

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[3/] The Commonwealth argues that the issuing judge had information from other affidavits submitted simultaneously in support of other warrant requests which justified a finding of probable cause in this case. If there were affidavits submitted in support of other applications for search warrants, they should have been incorporated by reference or attached to the affidavit, or at least presented at the time of the hearing on the motion to suppress. See Commonwealth v. Saville, 353 Mass. 458, 460 (1968); United States v. Nolan, 413 F. 2d 850, 853 (6th Cir. 1968). They do not appear in the record before us.

only specific facts on which probable cause concerning the Revere premises could have been based and that these conversations, coupled with any inferences which might reasonably be drawn from the circumstances, did not "establish a probability that the premises sought to be searched contained equipment for registering bets or conducting other gaming operations." Commonwealth v. Taglieri, Mass. App. Ct. (1978).[c/]

Judgments of the Superior Court reversed.

[c/]Mass. App.Ct. Adv. Sh. (1978) 1022.

APPENDIX B

COMMONWEALTH vs. HENRY L. TAGLIERI.

October 19, 1978.

The trial judges should have allowed the defendant's motion to suppress articles seized under a search warrant and introduced in evidence which resulted in convictions under G.L. c. 271, §§17 and 17A. The affidavit, dated July 31, 1974, in support of the application for the warrant, also dated July 31, 1974, did not "provide [ ] the magistrate with a substantial basis for concluding that any of such articles was probably present" on the premises sought to be searched. Commonwealth v. Stewart, 358 Mass. 747, 749 (1971).[a/]The only allegations in the affidavit with reference to those premises were that two telephone calls had been made to a telephone billed to the

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[a/]Mass. App. Ct. Adv. Sh. (1977) 478.

defendant at the address of the premises (herein referred to as the defendant's telephone), one on May 29, 1974, and one on June 13, 1974. Both calls had been made from a tapped telephone (G.L. c. 272, §99) assertedly used "to conduct an illegal gaming operation." The affidavit alleges that during the first telephone call, made by "Chick," a person identified as "Butch" at the defendant's telephone "place two horse race bets with 'Chick'." In the second conversation, also initiated by "Chick," he "spoke to a man he called 'Henry' [and] ...gave Henry the results of the first race at Suffolk Downs Race Track." No other connection between the defendant and users of the tapped telephone is indicated. Whatever else the conversations may show, they cannot be said to establish a probability that the premises sought to be searched contained equipment for registering bets or conducting other gaming operations. Compare Commonwealth v. Chagnon, 330 Mass. 278, 282-283 (1953). We need not discuss

any of the other points argued by the parties as to the validity of the affidavit or of the interception under G.L. c. 272, §99.

Judgments reversed.

Margaret Hayman, for the defendant.

Bernard Manning, Assistant Attorney General, for the Commonwealth.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT

AFFIDAVIT

I, John E. Conwell, being duly sworn, depose and say:

1. I am a Trooper, duly appointed and sworn, of the Massachusetts State Police, assigned to the Organized Crime Section of the Criminal Division of the Attorney General's Office. In my capacity as a State Police officer, I have had occasion to gather information concerning gambling and organized crime in Massachusetts.

2. I have information based upon personal knowledge as follows:

On May 10, 1974, Chief Justice Walter H. McLaughlin of the Superior Court of the Commonwealth, issued an order authorizing the electronic interception of telephone

calls made to and from telephones numbered: (617) 567-3796 and (617) 567-2527 billed to Joseph DiGiano, 310 Brandywyne Drive, East Boston, Massachusetts.

On May 28, 29, and 30, 1974, and on June 4, 7, 8, and 13, 1974, at various times between the hours of 9:00 a.m. and 12 Midnight, the telephone conversations made to and from telephone numbered (617) 567-3796, billed to Joseph DiGiano, 310 Brandywyne Drive, East Boston, Massachusetts, were intercepted and recorded by State Police officers.

On May 30 and 31, 1974, and June 4, 7, 8, and 13, 1974, at various times between the hours of 9:00 a.m. and 12 Midnight the telephone conversations made to and from telephone numbered (617) 567-2527 billed to Joseph DiGiano, 310 Brandywyne Drive, East Boston, Massachusetts, were intercepted and recorded by State Police officers.

The substance of the intercepted and recorded by State Police officers.

Based upon physical surveillance at 310 Brandywyne Drive, East Boston, and upon the

content of the intercepted conversations, I believe that the persons using the telephones were:

1. Domenic Settipane, Massachusetts Bureau of Identification No. 186644.

2. Steven Sansone, Massachusetts Bureau of Identification No. 352685.

3. James C. Ciccarello, Massachusetts Bureau of Identification No. 203653.

Each of these individuals has been convicted of gaming violations.

During the course of the authorized electronic surveillance, telephone calls were initiated from those telephones to various telephones in the Greater Boston area.

One such telephone was: (617) 289-0546 billed to Henry L. Taglieri, 132 Larkin Street, Revere, Massachusetts.

On May 29, 1974, at approximately 3:25 P.M. a man who identified himself as "Chick" whom I believe to be James S. Ciccarello, MBI #203653, initiated a telephone call from telephone instrument (617) 567-3796 to telephone instrument

numbered (617) 289-0546 and spoke to a man he called "Butch." During this call "Butch" placed two horse race bets with "Chick."

On June 13, 1974, at approximately 1:51 P.M. "Chick" using telephone instrument numbered (617) 567-3796, initiated a telephone call to telephone instrument numbered (617) 289-0546, billed to Henry L. Taglieri, 132 Larkin Street, Revere, and spoke to a man he called "Henry." The substance of this call was that "Chick" gave "Henry" the results of the first race at Suffolk Downs Race Track.

3. Based on the foregoing reliable information and upon my personal knowledge, there is probable cause to believe that the property hereinafter described may be found in the rooms of the two story wood frame dwelling house, color blue with white trim situated and numbered 132 in Larkin Street in the City of Revere, a photograph of said building being attached to this affidavit, and within the judicial district of said court.

4. The property for which I seek issuance of a search warrant is the following: Books, apparatus, and devices used for the purpose of registering bets upon the result of a trial or contest of skill, speed or endurance, of a man or beast; the buying and selling of pools; including monies; and all illegal lottery tickets, a share of a ticket, or any writing, certificate, bill, token or other device used in the furtherance of an illegal lottery.

WHEREFORE, I respectfully request that the Court issue a Warrant and Order of seizure, authorizing the search of the rooms of the two story wood frame dwelling house, color blue with white trim, in the City of Revere, situated and numbered 132 in Larkin Street, in the City of Revere, a photograph of said building attached to this Affidavit, and directing that if such property or evidence or any part thereof be found that it be seized and brought before the Court altogether with such other and

further relief that the court may deem proper.

Signed under the penalties of perjury.

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JOHN E. CONWELL
State Police Officer

Then personally appeared the above-named John E. Conwell and made oath that the foregoing Affidavit subscribed by him is true.

Before me this 31st day of July, 1974.

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JUSTICE OF THE SUPERIOR COURT